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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**BY HAND DELIVERY**

Magalie Roman Salas, Esquire  
Secretary  
Federal Communications Commission  
1919 M Street, NW, Room 222  
Washington, D.C. 20554

Re: MM Docket No. 97-234  
GC Docket No. 92-52  
GEN Docket No. 90-264

Dear Ms. Salas:

Transmitted herewith, on behalf of Pappas Telecasting of America, a California Limited Partnership, Illinois, are an original and four copies of its "Comments" in the above-referenced proceeding concerning implementation of Section 309(j) of the Communications Act, re-examination of the Policy Statement on comparative broadcast hearings, and proposals to reform the Commission's comparative hearing processes.

Should any questions arise concerning this matter, please communicate with the undersigned.

Very truly yours,  
FLETCHER, HEALD & HILDRETH, P.L.C.

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Enclosures

cc: Christopher J. Wright, General Counsel (with enclosure) **By Hand**  
Linda Blair, Chief, Audio Services Division (with enclosure) **By Hand**  
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ORIGINAL

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the	)	MM Docket No. 97-234
Communications Act -- Competitive Bidding for	)	
Commercial Broadcast and Instructional Television	)	
Fixed Service Licenses	)	
	)	
Re-examination of the Policy Statement on	)	GC Docket No. 92-52
Comparative Broadcast Hearings	)	
	)	
Proposals to Reform the Commission's	)	GEN Docket No. 90-264
Comparative Hearing Process to Expedite the	)	
Resolution of Cases	)	

Directed to: The Commission

**COMMENTS OF PAPPAS TELECASTING, INC.**

Pappas Telecasting of America, a California Limited Partnership ("Pappas"), by its attorneys, hereby respectfully submits its comments in the above-captioned proceeding with regard to implementation of Section 309(j) of the Communications Act with respect to competitive bidding for commercial broadcast licenses. With respect thereto, the following is stated:

1. Pappas and related entities are applicants for construction permits for a number of new television stations throughout the United States. These applications are mutually exclusive with other applications for the same television allotment. Accordingly, Pappas will be directly affected by the Commission's actions in the above-captioned proceeding and has a clear interest to ensure that the processes for resolving mutual exclusivity among applicants operate as smoothly and efficiently as possible.

2. In its *Notice of Proposed Rule Making*, FCC 97-397, released November 26, 1997 (the "*NPRM*"), the Commission has proposed procedures for implementing Section 309(j) of the Communications Act, which governs methods for resolving instances of mutual exclusivity. Those proposals address applications submitted to the Commission both before and after July 1, 1997. For applications filed on or after July, 1997, it is entirely clear that any instances of mutual exclusivity must be resolved by the competitive bidding process.

3. For applications submitted prior to July 1, 1997, the Commission tentatively concluded that auctions should be used to resolve pending broadcast initial licensing proceedings. *NPRM* at ¶23. Further, the Commission also tentatively interpreted the new Section 309(l) of the Communications Act<sup>1</sup> as prohibiting the Commission from opening any additional filing windows for applications which would be mutually exclusive with competing applications filed prior to July 1, 1997. Further, the Commission tentatively concluded that it would be prohibited from including as an eligible bidder any party which, after June 30, 1997, filed an application mutually exclusive with applications filed prior to that date.

4. Pappas strongly supports the Commission's conclusions. Indeed, the language of Section 309(l) makes it plain that the Commission cannot fairly reach any other conclusion with regard to the solicitation of any further mutually exclusive applications to participate in an auction proceeding. Specifically, that section states:

With respect to competing applications for initial licenses or construction permits for commercial radio or television stations that were filed with the Commission before July 1, 1997, the Commission shall--...

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<sup>1</sup> New Section 309(l) was added by Congress as part of the Balanced Budget Act of 1997.

(2) treat the persons filing such applications as the only persons eligible to be qualified bidders for purposes of such proceeding...

47 U.S.C. §309(l). The explicit language of the statute makes it quite clear that the Commission may not accept any applications filed after June 30, 1997, which would conflict with mutually exclusive applications filed previously.

5. The Commission has sought comment as to whether any other interpretation of the statute would be permissible. In light of the plain language of the statute, however, no other interpretation can be supported. It is an axiomatic principle of statutory construction that when the intent of Congress is clear, "that is the end of the matter; for the court, as well as the agency must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-843 (1984); *see also, Pension Benefit Guaranty Corporation v. LTV Corporation*, 496 U.S. 633 (1990). It is equally well established that "[s]tatutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of the language accurately expresses the legislative purpose." *Park 'n Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189,194 (1985). In this instance, the intent and language of Congress are entirely clear. The language of the statute explicitly states that only persons filing applications prior to July 1, 1997, may be considered as eligible bidders in proceedings involving other, mutually exclusive applications filed prior to that date. Thus, not only is the Commission not required to open any further filing windows for applications in conflict with mutually exclusive applications filed prior to July 1, 1997, it is expressly prohibited from doing so. Since the intent of Congress has been explicitly stated in the plain language of the statute, the Commission can only give effect to that clear intent.

6. Further, Pappas supports the Commission's conclusion that auction proceedings should be used to decide among mutually exclusive applications filed prior to July 1, 1997. The use of auctions will better serve the public interest by allowing for a speedier resolution of the proceedings and, thus, a speedier implementation of new service to the public. The prompt initiation of service from new television stations also will be beneficial to emerging new networks. The Commission has long found that the development of new networks serves the public interest.

7. As far back as 1941, when the Commission adopted its Chain Broadcasting Rules, a primary goal of the Commission was to remove barriers that would inhibit the development of new networks.<sup>2</sup> The Commission explained that the Chain Broadcasting Rules were intended to "foster and strengthen broadcasting by opening up the field to competition. An open door to networks will stimulate the old and encourage the new." *Report on Chain Broadcasting* at 88.

8. The successful emergence of new networks, however, will depend in large part upon its ability to attract and retain local affiliates, the life blood of any national network. Moreover, for emerging networks, it is critical that it be afforded the opportunity to compete for affiliates as quickly as possible. For any network starting out, large losses must be anticipated in the initial years. Those losses can be stemmed only by obtaining additional affiliates to carry the emerging network's programming. In many markets, however, there simply are not enough stations to provide for any affiliates for emerging networks in addition to an affiliate for each of the more established networks.

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<sup>2</sup> See, *Report on Chain Broadcasting*, Commission Order No. 37, Docket 5060 (May 1941) at 88 ("Report on Chain Broadcasting"); *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 25 F.C.C.2d 318, 333 (1970); *Fox Broadcasting Co. Request for Temporary Waiver of Certain Provisions of 47 C.F.R. §73.658*, 5 FCC Rcd 3211, 3211 n.9 (1990), (citing, Network Inquiry Special Staff, *New Television Networks: Entry, Jurisdiction, Ownership, and Regulation* (Vol. 1 Oct. 1980)), waiver extended, 6 FCC Rcd 2622 (1991).

Indeed, some markets do not even have sufficient stations to allow for even one affiliate for each of the older networks. Thus, it is imperative for emerging networks that new television stations be licensed as quickly as possible.

9. Although the Commission has noted that it is not the Commission's function to assure competitive equality in any given market, it has acknowledged its "duty at least to take such actions as will create greater opportunities for more effective competition among the networks in major markets." *Television Broadcasters, Inc.*, 4 R.R.2d 119, 123 (1965) (Commission granted a short-spacing waiver to an ABC affiliate based largely upon its finding that the station had inferior facilities compared to those available to other national networks in the market, which resulted in a "serious competitive imbalance"\_, *recon. granted in part on other grounds*, 5 R.R.2d 155 (1965). *See also, Peninsula Broadcasting Corporation*, 3 R.R.2d 243 (1964); *New Orleans Television Corp.*, 23 R.R. 1113 (1962) (short-spacing waiver granted for the purpose of assuring the existence of a third truly competitive station in the market, thereby making available competitive facilities to the networks).

10. The Commission has remained steadfast in its commitment to the goal of nurturing new networks. The history of the Commission's financial interest and syndication ("finsyn") rules is a case in point. Even as the regulation itself changed over the course of 25 years, the Commission did not waiver from its goal of nurturing new networks to serve the public interest. In 1970, when the Commission first adopted the finsyn rule, it noted that "[e]ncouragement of the development of additional networks to supplement or compete with existing networks is a desirable object and has long been the policy of this Commission." *Competition and Responsibility in Network Television Broadcasting*, 25 F.C.C.2d at 333. More than two decades later, when the Commission took action,

first to relax and later to eliminate the finsyn rule, it did so at the behest of the then-newest network entrant, Fox. Indeed, pending its review of the rule, the Commission granted Fox's request for a limited waiver of the rule. *Fox Broadcasting Co.*, 5 FCC Rcd at 3211 (1990). As Commissioner Duggan explained, "Fox has been a bright and innovative force. The existence of a fourth network is certainly in the public interest.... Fox deserves to be encouraged. *Broadcasting & Cable*, May 7, 1990, ed., p. 28; *accord*, *Application of Fox Television Stations, Inc. for Renewal of License of Station WNYW-TV, New York, New York*, 10 FCC Rcd 8452, 8528-29 (1995) (Commissioner Quello stating in his concurring statement, "I believe...that the creation of the fourth network was a compelling public interest goal."). In 1995, in deciding to phase out the finsyn rule entirely, the Commission similarly evaluated the rule's impact on "[t]he overall business practices of emerging networks, such as Fox, in the network television and syndication business...[and t]he growth of additional networks, including the development of Fox and its position vis-à-vis the three major networks." *Evaluation of Syndication and Financial Interest Rules*, 10 FCC Rcd 12165, 12166 (1995).

11. Appropriately, the Commission's goal of fostering new networks has not been limited to Fox. When the Commission first expanded its multiple ownership rules, it did so with the stated hope of fostering new networks. *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations*, 100 F.C.C.2d 17, 45 (1984) (relaxing restrictions on multiple ownership advances Commission's diversity goal by providing alternatives to the three television networks). In addition, the Commission has crafted rules and granted a variety of waivers designed to foster the development of new networks over the years. In 1967, for example, the Commission granted a waiver of the dual network rule to ABC, the then new

network entrant, in connection with ABC's four new specialized radio networks. Although operation of the four networks violated the dual network rule, the Commission nonetheless concluded that waiver of the rule was appropriate because ABC's proposal "merits encouragement as a new and imaginative approach to networking." *Proposal of American Broadcasting Cos., Inc. to Establish Four New Specialized "American Radio Networks,"* 11 F.C.C.2d 163, 168 (1967). The Commission explained that it was "of more than usual importance to encourage to the extent possible innovation and experimentation in the operation of networks." *Id.* at 165.

12. These instances are merely examples of the Commission's steady support for the goal of encouraging new networks. It is clear that the Commission has consistently concluded over more than fifty years that the development of new networks, with the accompanying diversity of viewpoint that they bring, serves the public interest. In order for emerging networks to survive, however, it is imperative that they be afforded the opportunity to compete for local affiliates. Accordingly, the speedy authorization of new local television stations is critical to the goal of promoting the viability of emerging new networks. Therefore, it can only be concluded that the use of auctions to decide among mutually exclusive applications filed prior to July 1, 1997, would best serve the public interest.

13. Moreover, it is quite clear that the Commission is fully empowered to elect to use auctions in these proceedings. First and foremost, Section 309(l) of the Communications Act explicitly states that, with respect to mutually exclusive applications filed prior to July 1, 1997, the Commission shall "have the authority to conduct a competitive bidding proceeding pursuant to subsection (j) to assign such license or permit...." 47 U.S.C. §309(l). Thus, the plain language of the statute makes it clear that Congress intended for the Commission to proceed forward with



auctions in such proceedings in its discretion. Although the use of auctions may be contrary to the expectations of some applicants who filed their applications prior to July 1, 1997, this fact is not controlling. The courts have previously upheld Commission actions in changing the rules whereby licenses would be awarded despite the fact that the new rules were contrary to the reasonable expectations of some parties. *DIRECTV, Inc. v. FCC*, 110 F.3d 816 (D.C. Cir. 1997). The U.S. Court of Appeals for the D.C. Circuit has stated that a change in rules which upsets expectations nevertheless “may be sustained ‘if it is reasonable,’ i.e., if it is not ‘arbitrary’ or capricious.” *Id.* at 826, quoting, *Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996). In this instance, the Commission has in the *NPRM* provided well-reasoned support for its conclusion that auction proceedings should be adopted in order to choose among mutually exclusive applications filed prior to July 1, 1997. Furthermore, as set forth above, public interest benefits, including the prompt institution of new service to the public and the promotion of emerging networks, support the Commission’s conclusion.

14. Thus, Pappas strongly supports the Commission’s tentative conclusions that auctions should be adopted as the means for selecting among competing applications filed prior to July 1, 1997, and that only those applicants with applications on file prior to that date should be

considered as qualified bidders in such auction proceedings. The Commission should not, and indeed may not, open further filing windows to solicit applicants to participate in such auction proceedings.

Respectfully submitted,

PAPPAS TELECASTING OF AMERICA,  
A CALIFORNIA LIMITED PARTNERSHIP

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